Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor

HIGH COURT (PULAU PINANG) — CRIMINAL APPLICATION NO 44–75 OF 2001
SU GEOK YIAM JC
5 AUGUST 2002

Civil Procedure *— Jurisdiction — High Court — Application in respect of custody of Muslim child — Parties to application Muslims — Whether High Court had jurisdiction to hear application — Whether application should be made to Syariah Court instead — Federal Constitution art 121(1A)*

Criminal Procedure *— Habeas corpus — Invalid ground for — Custody of child — Application for child to be brought forthwith before court and to receive whatever order the court may make for the good of the child — Application for habeas corpus not mounted on ground that child illegally or improperly detained in the respondents' private custody — Whether court had jurisdiction to grant the writ of habeas corpus*

Islamic Law *— Jurisdiction — Syariah Court — Application in respect of custody of Muslim child — Parties to application Muslims — Whether High Court had jurisdiction to hear application — Whether application should be made to Syariah Court — Federal Constitution art 121(1A)*

This was a criminal application for a writ of habeas corpus pursuant to art 5 of the Federal Constitution and s 365 of the Criminal Procedure Code for a 14-year old child to be brought forthwith before the court by the respondents and to receive whatever order that may be made by the court for the good of the child. The grounds as set out in the application were that the child was the natural child of the applicants and that there was a order granted by the Syariah subordinate court for the applicants to be given custody of the child. The first respondent was the youngest sister of the first applicant and the second respondent was the first respondent's husband. The first and second respondents were asked to look after the child because the first applicant was in ill-health after she had given birth to the child. Three months after delivering the child, the first applicant was treated at the psychiatric unit of the Penang General Hospital for post-partum depression. The first applicant subsequently recovered from that illness. The child, however, continued to be taken care of by the first respondent but the first respondent would bring the child to the applicants' house in Penang and leave the child there during the weekends and public holidays. Subsequently, the applicants noticed that the child was not paying attention to her studies as the respondents did not bother to encourage the child to study. According to the applicants, the respondents wanted the child to assist them in the running their provision shop, mini market and at the night market. About a year before filing this application, the first applicant began to criticize the first respondent about the upbringing of the child by the respondents and this caused the respondents to take offence.

Thereafter, the respondents refused to allow the applicants and the child to see each other and began to instigate the child against the applicants. The applicants then filed a summons in the Syariah subordinate court seeking custody of the child. The respondents did not object to the summons and did not file any defence to the summons. An order was accordingly made by the Syariah subordinate court giving the applicants custody of the child until she reached 16 years of age ('the custody order'). Thereafter, the child returned to the applicants but the respondents succeeded in persuading the child to return to them. The respondents then refused to return the child to the applicants and arising therefrom, the applicants sought to commit the respondents for breaching the custody order. The Syariah subordinate court held that the respondents were in breach of the custody order but further held that since the respondents had shown reasonable cause as to why the respondents should not be committed to prison, the applicants' application to commit the respondents was dismissed ('the second order'). At the outset of this application, learned counsel for the respondents raised a preliminary objection that pursuant to art 121(1A) of the Federal Constitution, the High Court did not have the jurisdiction to hear the application because both the parties were Muslims and the subject matter of the application was the custody of a Muslim child.

Held, allowing the preliminary objection and dismissing the application:

(1) The second order by the Syariah subordinate court was a valid and subsisting order which had overtaken the custody order. The second order could not be challenged in a civil court by virtue of art 121(1A) of the Federal Constitution (see p 607C).

(2) The effect of the second order was that the applicants' sole recourse was to appeal to the Syariah High Court against the second order. The High Court could not go into the merits of the second order because the High Court had no jurisdiction to review it but instead had to accept it as a valid and subsisting order (see p 607C–D).

(3) The instant application for a writ of habeas corpus was not mounted on the ground that the child was illegally or improperly detained in the respondents' private custody. The objective of the application was to seek an order of the High Court that the child be produced for the purposes of the hearing of the application on its merits and thereafter, for the High Court to order the child to be returned to and be brought up by the applicants in the event that the applicants succeed in satisfying the High Court that such an order would be in the best interests of the child. The High Court had no jurisdiction to grant the order sought because the writ of habeas corpus could only be granted to order that the child be set at liberty if the child was illegally or improperly detained. It

A was for the Syariah court to determine whether it was in the best interests of the child that she be returned to the applicants (see p 607E–G); *Lim Yik Ying v Liang Yung Piao & Anor* [2000] 1 MLJ 205 [1999]; 4 AMR 4668.]

B **[Bahasa Malaysia summary**

Ini merupakan satu permohonan di bawah undang-undang jenayah untuk writ habeas corpus menurut perkara 5 Persekutuan Perlembagaan dan s 365 Kanun Acara Jenayah supaya seorang budak berumur 14 tahun dibawa dengan serta-merta di hadapan mahkamah C oleh responden-responden dan untuk menerima apa-apa perintah yang bakal dibuat oleh mahkamah demi manfaat si budak. Alasan-alasan seperti yang dinyatakan dalam permohonan adalah bahawa si budak merupakan anak kandung pemohon-pemohon dan satu perintah telah diberikan oleh mahkamah rendah Syariah supaya pemohon-pemohon diberikan jagaan ke atas si budak. Responden D pertama merupakan adik perempuan bongsu pemohon pertama dan responden kedua merupakan suami responden pertama. Responden pertama dan kedua diminta menjaga budak tersebut kerana pemohon pertama tidak sihat selepas melahirkan anak. Tiga bulan selepas melahirkan anak, pemohon pertama dirawat di unit psikiatri Hospital E Awam Pulau Pinang untuk kemurungan selepas bersalin. Sejak itu pemohon pertama telahpun beransur pulih dari penyakit itu. Walau bagaimanapun, si budak terus dijaga oleh responden pertama tetapi responden pertama selalunya membawa si budak ke rumah pemohon-pemohon di Pulau Pinang dan meninggalkannya di situ semasa hari minggu dan cuti awam. Berikutnya, pemohon-pemohon F memerhati bahawa si budak tidak memberi perhatian kepada pelajarannya kerana responden-responden tidak cuba mendorong si budak supaya belajar. Menurut pemohon-pemohon, responden-responden mahu si budak membantu mereka dalam mengendalikan kegiatan mereka di kedai runcit, 'mini market' dan di pasar malam. Kira-kira setahun sebelum memfailkan permohonan ini, pemohon G pertama mula mengkritik responden pertama mengenai asuhan si budak oleh responden-responden dan ini menyebabkan responden-responden berasa sakit hati. Sesudah itu, responden-responden enggan membenarkan pemohon-pemohon dan budak tersebut saling berjumpa dan mula menghasut si budak terhadap pemohon-H pemohon. Pemohon-pemohon kemudian memfailkan satu saman di mahkamah rendah Syariah memohon jagaan ke atas si budak. Responden-responden tidak membantah saman tersebut dan tidak memfailkan apa-apa pembelaan terhadap saman tersebut. Oleh itu, satu perintah dibuat oleh mahkamah rendah Syariah yang memberikan pemohon-pemohon jagaan ke atas si budak sehingga I beliau mencapai umur 16 tahun ('perintah jagaan'). Selepas itu, si budak kembali kepada pemohon-pemohon tetapi responden-responden berjaya meyakinkannya supaya kembali kepada mereka.

Responden-responden kemudiannya enggan mengembalikan si budak ke pangkuan pemohon-pemohon dan berbangkit daripada itu, pemohon-pemohon ingin mendakwa responden-responden kerana memungkiri perintah jagaan. Mahkamah rendah Syariah memutuskan bahawa responden-responden telah memungkiri perintah jagaan tetapi seterusnya memutuskan bahawa memandangkan responden-responden telah menunjukkan sebab yang munasabah tentang mengapa responden-responden tidak harus dimasukkan ke penjara, permohonan pemohon-pemohon untuk mendakwa responden-responden ditolak ('perintah kedua'). Di permulaan permohonan ini, peguam yang arif untuk pihak responden membangkitkan bantahan permulaan bahawa menurut perkara 121(1A) Perlembagaan Persekutuan, mahkamah ini tidak mempunyai bidang kuasa untuk mendengar permohonan tersebut kerana kedua-dua pihak beragama Islam dan perkara permohonan adalah mengenai jagaan seorang budak Islam.

Diputuskan, membenarkan bantahan permulaan dan menolak permohonan:

(1) Perintah kedua oleh mahkamah rendah Syariah merupakan perintah sah dan masih kekal yang telah mendahului perintah jagaan. Perintah kedua tidak boleh dicabar di mahkamah sivil disebabkan perkara 121(1A) Perlembagaan Persekutuan (lihat ms 607C).

(2) Kesan perintah kedua ialah bahawa satu-satunya jalan yang terbuka kepada pemohon-pemohon adalah untuk membuat rayuan kepada Mahkamah Tinggi Syariah terhadap perintah kedua. Mahkamah Tinggi tidak boleh meneliti merit perintah itu kedua kerana Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mengkajinya semula tetapi sebaliknya harus menerimanya sebagai perintah yang sah dan dan masih kekal (lihat ms 607C–D).

(3) Permohonan ini untuk writ habeas corpus tidak berasaskan alasan bahawa si budak ditahan bertentangan dengan undang-undang atau secara salah dalam jagaan persendirian responden-responden. Objektif permohonan adalah untuk memohon perintah daripada Mahkamah Tinggi bahawa si budak harus dikemukakan untuk tujuan pembicaraan permohonan atas meritnya dan selepas itu, untuk Mahkamah Tinggi memerintahkan supaya si budak dikembalikan kepada dan diasuh oleh pemohon-pemohon sekiranya pemohon-pemohon berjaya dalam memuaskan mahkamah bahawa perintah sedemikian adalah demi kepentingan si budak. Mahkamah Tinggi tidak mempunyai bidang kuasa untuk membenarkan perintah yang dipohon kerana writ habeas corpus hanya boleh diberikan untuk memerintah supaya si budak dilepaskan sekiranya si budak ditahan bertentangan dengan undang-undang atau secara salah. Adalah terpulang kepada Mahkamah Syariah untuk menentukan

A sama ada ia adalah dalam kepentingan si budak jika dikembalikan kepada pemohon-pemohon (lihat ms 607E–G).]

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal vide Criminal Appeal No 05–49 of 2002(P).]

B

Notes

For cases on invalid grounds for habeas corpus, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1762–1772.

For cases on jurisdiction of the High Court, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3724–3775.

C For cases on jurisdiction of the Syariah Court, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 493–513.

Cases referred to

D *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 (refd)

Lim Yik Ying v Liang Yung Piao & Anor [2000] 1 MLJ 205; [1999] 4 AMR 4668 (distd)

Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu yang lain [1992] 2 MLJ 224 (refd)

E *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793 (refd)

Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor [1997] 1 MLJ 537 (refd)

Soon Singh all Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489 (refd)

F *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241 (refd)

Legislation referred to

G Administration of Islamic Religious Affairs Enactment 1993 ss 48(2)(b)(iii), 50(1), 81, 86(1), 87, Part IV

Courts of Judicature Act 1964 Schedule para 1

Criminal Procedure Code s 365

Federal Constitution arts 5, 74, 75, 121(1A)

Rules of the High Court 1980 O 18 r 19

H *Darshan Singh Khaira* (*Darshan Singh & Co*) for the applicants.

Ahmad Munawir (*Lim Kean Siew & Co*) for the respondents.

Su Geok Yiam JC: This is a criminal application vide an originating motion filed on 13 December 2001 (encl 2) together with a supporting affidavit (encl 1), and a certificate of urgency (encl 3) for an affidavit

I (encl 1), and a certificate of urgency (encl 3) for a writ of habeas corpus pursuant to art 5 of the Federal Constitution ('the FC'), and s 365 of the Criminal Procedure Code ('the CPC') for a child, Nazirah bte Kamaldin

('the child'), to be brought forthwith before the court by the respondents and to receive whatever order that may be made by the court for the good of the child, that the respondents pay the costs of the application, and that the child be brought before the court for the hearing of the application. A

The grounds as set out in the application are that the child is underaged and is the natural child of the applicants and there is an order dated 4 May 2001 that the custody of the child be given to the applicants. The other grounds are as set out in the applicants' joint affidavit in support of their application. B

The following facts (both agreed and disputed) and background are contained in the applicants' supporting affidavit (encl 1) jointly affirmed on 12 December 2001, the respondents' affidavit in reply (encl 5) affirmed on 10 January 2002 and the applicants' affidavit in reply (encl 6) affirmed on 22 January 2002. C

The applicants' case

The applicants, Azizah bte Shaik Ismail and Kamaldin bin Mohd Abdullah, are the natural parents of the child. At the time when the application was filed, the child, the youngest of the applicants' four children, was aged 14 years. The applicants have three other daughters aged 21 years, 20 years and 16 years, respectively. D

The first respondent, Fatimah bte Shaikh Ismail, a housewife, is the youngest sister of the first applicant. She is married to Osman bin Abdul Hamid, the second respondent, who operates a small provision shop in Kedah. The first and second respondents are the de facto foster parents of the child. This came about because when the first applicant gave birth to the child by caesarean section on 22 December 1987, the first applicant was in ill-health. E F

The first respondent was asked to look after the child temporarily. However, three months after delivering the child, the first applicant suffered from post partum depression and was treated at the Psychiatric Unit of the Pulau Pinang General Hospital for about one and a half months after which she recovered completely. G

The child, however, continued to be taken care of by the first respondent. The first respondent would bring the child to the applicants' house in Pulau Pinang and leave the child there during the weekends, public holidays and even during the week days during the child's pre-school days. The first respondent, too, would go to the applicant's house and stay there when she wanted to be near the child. During the child's primary school days, the child visited the applicants during the weekends and stayed with the applicants during the school holidays, Hari Raya holidays and other religious holidays. H

Subsequently, the applicants, noticed that the child was not studious. She did not pay attention to her studies nor her books. She did not have any reading habits unlike their three other children. She whiled her time away in frivolous activities like listening to the radio, watching Hindi and Malay I

movies on television and video compact discs or just chitchatting over frivolous things. The respondents, too, did not bother to encourage the child to study. Neither did they supervise nor guide the child in her studies. The respondents wanted the child to assist them in the running of their small provision shop and mini market and at the night market or 'pasar malam' together with their neighbour and to receive payment from their neighbour. The child was not taught proper manners, deference to and respect for elders in accordance with Malay customs. The applicants taught her the proper way to behave and scolded the child on several occasions, and on one or two occasions the first applicant hit the child.

When the child was due for her secondary education, the applicants enrolled her in a school in Pulau Pinang. However, the respondents kept on harassing the child and even took her back to Kedah and changed her school without the applicants' knowledge or consent. The respondents also took the child home every Saturday when the applicants were at work without the applicants' knowledge or consent. This interrupted the child's studies. Sometimes, the respondents asked the child to return home by bus.

The applicants intend to send the child to university like all their other daughters and are afraid that if the child is allowed to remain with the respondents, there is no hope of that. About a year before filing this application, the first applicant began to criticize the first respondent about the upbringing of the child by the respondents, their lack of proper guidance, control and supervision over the child and the lack of progress by the child in her studies. She was weak in almost all her school subjects.

This caused the respondents to take offence and umbrage and they, suddenly, refused to allow the applicants to see the child or allow the child to see the applicants and instead began to instigate the child against the applicants and to poison the child's mind against the applicants. When the first applicant telephoned the child, the child abused the first applicant. All the applicants' relatives and friends tried to intervene to persuade the respondents to settle the matter amicably but to no avail as the respondents refused to compromise nor to allow the child to be returned to the applicants. Despite all these, the applicants have no intention to sever ties with the respondents.

The applicants felt that they had no choice but to engage Messrs Razak & Co, Pulau Pinang as their solicitors to file a summons in the Mahkamah Rendah Syariah Bandaraya Georgetown vide case No KM01–305–2000 in September 2000, seeking for custody of the child and stating the willingness of the applicants to allow the child to visit the respondents and even to stay with the respondents during the weekends although in law the respondents have absolutely no rights over the child because there has not been a formal adoption of the child by the respondents. The respondents did not object to the summons. They also did not file any defence to the summons and on 5 October 2000, an order was made by the Syariah Court giving the applicants custody of the child until she is aged 16 years (exh 'A1') ('the custody order'). Thereafter, the child returned to be with the applicants but the respondents continued to disturb the child's peace of mind and finally

succeeded in persuading her to return to them. The applicants exercised a tight control over the child, especially in her studies and the child did not like it. After taking the child, the respondents refused to return the child and the applicants through their solicitors filed against the respondents a civil case in the Georgetown Syariah Court vide No KM01–383–2000 for breaching the custody order. Unfortunately, on 4 May 2001, the Georgetown Syariah Court dismissed the applicants' application.

Out of good relationship and kindness, the applicants did not want to force the respondents to give custody of the child to the applicants but the future of the child is at stake. The applicants love the child. All attempts by the applicants' relatives have failed to persuade the respondents to give custody of the child to the applicants. The respondents remain adamant, defiant and stubborn. When the respondents knew that the applicants intended to file legal proceedings to obtain a court order, they even instigated the child to make police reports against the applicants. The respondents also told the child that the child could not be returned to the applicants as the respondents had won the case in the Syariah Court and that the police would arrest the child if the respondents returned the child to the applicants. The child has frequently been absent from school which the applicants suspect is due to the respondents wanting the child to help the respondents in their shop during the day and at their van during the night time at the night market. The applicants are also unhappy that the respondents' foster son, Mohamed, who is eight years old and who is not related by blood to the applicants nor to the respondents, is staying in the same house as the child.

The respondents are bound by the custody order and to obey the same but the respondents have continued to defy the same and also to deny the applicants access to their own natural daughter. The applicants sought to commit the respondents for breaching the custody order. Unfortunately, while the Mahkamah Rendah Syariah held on 4 May 2001 that the respondents were in breach of the custody order, it also held that the respondents had shown reasonable cause as to why the respondents should not be committed to prison since the child herself has refused to return to the applicants. The applicants were advised to take other proceedings in the civil courts.

The respondents' case

In their affidavit in reply, the respondents expressly reserved their right to raise a preliminary objection on the ground that this court has no jurisdiction to entertain the applicant's application for a writ of habeas corpus.

The respondents aver, inter alia, that when the child was only two weeks old, she had been handed over to them with the consent of the applicants to be brought up as the child of the applicants on the ground that the applicants already had three daughters whereas the respondents did not have any child of their own.

A The respondents deny that the child was only handed over to them to be cared for temporarily. The respondents state that right until the time when the child attained the age of ten years, the applicants did not express any intention to have the child returned to them.

The respondents aver that up until the date they affirmed their affidavit B in reply, the first applicant has not recovered fully from her psychiatric condition because the conduct of the first applicant is not normal as the first applicant often abuses her family members including her mother and the child. It was because of this reason that the child has refused to return to the first applicant despite being persuaded to do so.

The respondents aver that they have never prevented the child from C becoming close to the applicants who are, after all, the child's natural parents. The respondents deny that they have not brought up the child properly. The respondents also deny that the child took any part in their daily business affairs as they have engaged full-time workers to assist them.

The respondents describe the child as a wholesome teenager who is D disciplined both in her studies as well as socially and who spends most of her free time in school activities and in pursuing knowledge.

Out of love and affection and because of family ties, the respondents handed the child back to the applicants. The child was registered in a secondary school in Pulau Pinang. The applicants promised the child that E she would be allowed to visit the respondents once every fortnight during term time and also during the school holidays. However, the child was only allowed to visit the respondents in the first month. In the second month, the first applicant disallowed the child from visiting the respondents. The first applicant also disallowed the respondents from visiting the child at the applicants' home. The first applicant further took to abusing the F respondents in front of the child.

This caused tension between the child and the applicants which led to the child running away from the applicant's home on several occasions. Nevertheless, the respondents persuaded the child to return to the applicants' home by sending her back to the applicants' home.

G The second applicant gave his word to the applicants that he would persuade the first applicant not to repeat her previous conduct of scolding the child and disallowing the child from visiting the respondents.

In August 2000, the first applicant hit the child with a metal clothes hanger until the child's head became swollen. The first respondent lodged a police report vide Dato' Keramat, Timur Laut, Pulau Pinang Report H 3372/2000 (exh 'C') and took the child to the hospital to seek treatment. This led to the child refusing to return to the applicants, especially the first applicant.

The respondents aver that the custody order was made by consent on their first appearance in the Syariah Court without the knowledge or I consent of the child because they wanted to avoid any undesirable incident from befalling on the child. At that time, they were given to understand that they had no defence on merits in respect of the applicants' claim for custody

of the child. They also had no benefit of legal advice concerning their and the child's legal rights. A

Subsequent to the custody order, the child had on 14 October 2000, lodged a police report vide Tikam Batu Report No 864/2000 (exh 'D') expressing her desire to stay with the respondents.

The applicants, however, insisted on taking the child against her will. B On 26 October 2000, the child lodged another police report vide Tikam Batu Report No 910/2000 (exh 'E') alleging that when she refused to follow the applicants at the Tikam Batu Police Station, a struggle ensued when her natural father attempted to force her into a taxi and the applicants used force on her by dragging her and punching her on her back. In the process, her dress was torn and she felt ashamed. She also had scratches on her back. C

The Social Welfare Department acted upon the child's complaint and prepared a report dated 29 October 2000 (exh 'F') in which it was stated, inter alia, that the child had refused to return to her natural parents after having being beaten in the month of August. It also stated that the child could not adapt to conditions in her natural parents' home, and therefore, D she was not able to continue to live with her natural parents.

The respondents also stated that the applicants made three attempts to take the child but failed to do so because of the child's refusal to follow the applicants and on the third attempt, ie on 26 October 2000, the child's dress was torn and she was prepared to sleep in the surau rather then return with her natural parents to Pulau Pinang. E

The respondents have sought advice from their Syarie solicitors and have been advised, inter alia, that the acts of the applicants, in particular, the first applicant, threaten the welfare and safety of the child and can cause them to be deprived of their right to the custody of the child and that the respondents can apply to have the custody order set aside. F

On 21 November 2000, the applicants successfully applied for an order from the Georgetown Mahkamah Rendah Syariah that the respondents do show cause why they should not be committed to prison for breaching the custody order.

In the course of the committal proceedings, the learned Syariah Court G judge interviewed the child in his chambers. Based on the affidavits of both parties and having heard both their counsels' submissions held on 4 May 2001, the respondents had shown reasonable cause why they should not be committed to prison and the applicants' application was dismissed.

His grounds for doing so appear in his judgement (exh 'H').

Following from that, the respondents have instructed their syarie H counsel to apply to set aside the custody order.

The respondents aver that the actions of the applicants towards the child are not in accordance with the needs for guidance, love and affection of a child who is growing up in her teenage years. They say that the actions of the first applicant, in particular, towards the child have caused I interruptions in the child's education because it has led to her switching from one school to another. The respondents aver that the learned

A Syariah Court judge had advised the parties to settle the matter amicably and to take the appropriate action if necessary. At no point in time, did the learned Syariah Court judge advise the parties to take proceedings in the civil court.

B *The applicants' reply*

The applicants and their three other daughters share a close relationship with the child.

The contents of the police reports lodged by the first respondent and the child are false and were lodged in order to intimidate the applicants.

C The report dated 29 October 2000, purportedly made by one Roshidah bte Ismail, a social welfare officer, is in actual fact only a letter which was fabricated and the applicants were never given the opportunity to express their views. Neither were they interviewed by her. It was not true that the applicants never asked for the child back before she attained the age of ten years old. In actual fact, after the first applicant recovered fully from her D post partum depression, she and the second applicant made repeated requests to the respondents for the return of the child but the respondents refused to do so even though the mother of the first respondent and the first applicant advised the first respondent to do so.

The respondents have neglected the studies of the child by giving her E too much freedom, requiring her to assist them in their business activities, calling her constantly over the telephone when she was staying with the applicants, preventing her from returning to school on a Monday and sometimes two days following her fortnightly visit to the respondents' home, insisting that the child visit the respondents every weekend and taking the child to Kedah whilst the applicants were away at work.

F The first applicant did not abuse the child by hitting the child on her head. She had hit the child on her hand in order to teach and guide the child because of the child's stubborn attitude which was brought about by the instigation of the respondents. This led to the respondents disallowing the child from seeing the applicants.

G *The issues*

The issues are as follows:

(i) whether the court can order that the child be brought before this court for the hearing of the applicants' application; and

H (ii) whether it is for the good of the child for this court to order the child to return to and stay with the applicants.

The preliminary objection

At the outset, En Ahmad Munawir, the learned counsel for the respondents, I raised a preliminary objection. He contends that pursuant to art 121(1A) of the FC, this court is barred from hearing this application on the ground that only the Syariah Court has the exclusive jurisdiction to hear this application

since both the parties are Muslims and the subject matter of the application is the custody of a Muslim child. A

In support thereof, he has relied on the following authorities viz *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793 (SC) and *Lim Yik Ying v Liang Yung Piao & Anor* [[2000] 1 MLJ 205, [1999] 4 AMR 4668 (CA). B

In response, Mr Darshan Singh Khaira, the learned counsel for the applicants, submits that this court has jurisdiction to hear this application for a writ of habeas corpus even though both the parties are Muslims.

He anchors his submissions on the following grounds:

First, he relies on the fact that as the respondents have not appealed against the custody order which was granted inter partes in favour of the applicants by the Syariah Court on 5 October 2000, that order stands unchallenged and should be given effect to. C

In view of that, he says that the contents of the respondents' affidavit in reply (encl 5) and the applicants' affidavit in reply (encl 6) are irrelevant as this court cannot go behind the custody order. He says further that it is trite law that as the parties are Muslims only the Syariah Court has jurisdiction to decide on questions of custody. Thus, this court is bound by that custody order and should give effect to it. He relies on the case of *Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor* [1997] 1 MLJ 537. D

Secondly, he says that there is no provision in any of the State Administration of Islamic Religious Affairs Enactments providing for habeas corpus. There is also no provision in any other law giving jurisdiction and power to the Syariah Court to hear and decide habeas corpus applications. The jurisdiction of the High Court in habeas corpus matters is provided for in art 5(2) of the FC and by federal law to wit, s 365 of the CPC and para 1 of the Schedule in the Courts of Judicature Act 1964. Even if there is any state law which gives jurisdiction to the Syariah Court in habeas corpus matters, it would be ultra vires art 75 of the FC and would, therefore, be invalid. No where is it stated in art 121(1A) of the FC that state laws can give jurisdiction to the Syariah Court in habeas corpus matters. Jurisdiction to grant a writ of habeas corpus is given by federal law and not provided for in matters reserved for the Syariah Court under the state list. He argues that the order of the Syariah Court refusing to hold the respondents in contempt for failing to hand over the child to the applicants is a nullity. E F G

He submits, therefore, that it is appropriate to go by way of habeas corpus to enforce a custody order in respect of a child which has been obtained by consent. H

In reply, En Ahmad Munawir submits that since s 365(a)(ii) of the CPC has been invoked in this application, the court has to determine who has the better right to the custody of the child based on the child's welfare and since the Syariah Court has the sole jurisdiction over the welfare of the child in custody matters this court has no jurisdiction to issue the writ of habeas corpus sought for by the applicants. I

A He relies on *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241 (FC) in support of his contention that this court cannot review the decision of the Syariah Court made in the committal proceedings and that the applicants should appeal to the Syariah High Court if they are not happy with the decision of the learned Syariah subordinate court judge in refusing to commit the respondents to B prison for failing to hand over the child to the applicants.

Mr Darshan Singh, on the other hand, urges the court to apply *Lim Yik Ying* where the facts are on all fours with the facts of the instant case and hold that habeas corpus is the correct remedy to ask for. In that case, the Court of Appeal had set aside the order of the learned High Court judge C dismissing the application of the appellants for a writ of habeas corpus for the release to them of their natural daughter aged eight years since the learned High Court judge had given a previous order giving custody of the child to the appellants.

In doing so, the Court of Appeal held as follows and I reproduce below D the headnotes of the case under 'Held' in the AMR report:

> 1 It was not open to the respondents in the habeas corpus application to challenge the validity of the custody order dated 21 July 1998 granting legal custody to the appellant. Although the respondents were not cited as parties to the originating summons, if they were serious in asserting their legal rights to the custody of the child, they should have taken steps E to intervene in the originating summons and set aside the custody order made by the court, in accordance with s 10 of the Act. This they failed to do, and neither did they take steps to adopt the child if they honestly believed that the parents had abandoned the child. Instead the respondents seemed more interested in getting paid for taking care of and maintaining the child.
>
> F 2(a) Although the difficulties in resolving the facts could be appreciated the matter could have been resolved by resorting to O 38 r 2(3) of the Rules of the High Court 1980. The burden of proving lawful justification was on the respondents. It was for the respondents to urge the court to invoke its discretionary power under O 38 r 2(3) and apply to the court for cross-examination of the appellant on her affidavits.
>
> G (b) The learned judge had erred in the order he made. The learned judge should have given due consideration to the custody order and its effect vis-a-vis the respondents. The issue of conflicting facts in the affidavits of both parties were of no importance in the face of the custody order. Prima facie, the appellant should be granted legal custody of the child.

H *The law*

The court shall now deal with the relevant law concerning habeas corpus and custody of Muslim children. Article 5 of the FC provides as follows:

> (1) *No person shall be deprived of his* life or *personal liberty save in accordance* I *with law.*
>
> (2) *Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and unless*

satisfied that the detention is lawful, shall order him to be produced before the court and release him. (Emphasis added.)

Article 74 of the FC provides as follows:

(1) Without prejudice to any power to make laws conferred on it by any other Article, *Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List* (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, *the Legislature of a State may make laws with respect to any of the matter enumerated in the State List* (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this art is exercisable subject to any conditions or restriction; imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matters enumerated in the List set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter. (Emphasis added.)

Article 121 of the FC provides as follows:

Judicial power of the Federation

(1) *There shall be two High Courts of co-ordinate jurisdiction and status, namely —*

(a) *one in the States of Malaya, which shall be known as the High Court in Malaya* and shall have its principal registry in Kuala Lumpur; *and*

(b) *one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak* and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed).

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) *The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.* (Emphasis added.)

The CPC was passed by Parliament pursuant to art 74 of the FC. Section 365 of the CPC provides as follows:

The High Court may whenever it thinks fit direct —

(a) *that any person who*:

(i) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992 [Act 479]; or

(ii) *is alleged to be illegally or improperly detained in* public or *private custody* within the limits of Malaysia.

be set at liberty;

(b) that any defendant in custody under a writ of attachment be brought before the Court to be dealt with according to law. (Emphasis added.)

In Pulau Pinang, the Administration of Islamic Religious Affairs Enactment 1993 ('the Enactment') contains provisions which provide comprehensively for the custody of Muslim children.

Section 48(2)(b)(iii) of the Enactment provides that a Syariah High Court shall in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to, inter alia, the guardianship or custody (hadhanah) of infants.

Section 50(1) of the Enactment provides that an appeal shall lie to the Syariah High Court against any decision of a Syariah subordinate court in its criminal jurisdiction or in its civil jurisdiction or in any other case if the Syariah High Court gives leave to appeal.

Part IV of the Enactment deals expressly with *hadhanah* or custody of children.

Section 81 provides as follows:

(1) Subject to s 82, the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution.

(2) *Where the court is of the opinion that the mother is disqualified under 'Hukum Syara' from having the right to hadhanah or custody of her children the right subject to subsection (3), pass to one of the following order of preference, that is to say* —

(a) the maternal grandmother, how highsoever;
(b) the father;
(c) the paternal grandmother, how highsoever;
(d) the full sister;
(e) the uterine sister;
(f) the sanguine sister;
(g) the full sister's daughter;
(h) the uterine sister's daughter;
(i) the sanguine sister's daughter;
(j) the maternal aunt;
(k) the paternal aunt;
(l) the male relatives who could be their heirs as '*asabah* or residuaries'.

Provided that the custody of that person does not affect the welfare of the child.

(3) No man shall have a right to the custody of a female child unless he is a *muhrim*, that is to say, he stands to her within the prohibited degrees of relationship.

(4) *Where there are several persons of the same line or degree, all equally qualified and willing to take charge of the child, the custody shall be entrusted to the one most virtuous who shows the greatest tenderness to the child, and where all are equally virtuous, then the senior among them in age shall have the priority.* (Emphasis added.)

Section 86(1) of the Enactment provides as follows:

(1) *Notwithstanding s 81, the court may at any time by order choose to place a child in the custody of any one of the persons mentioned therein or, where there are exceptional circumstances making it undesirable that the child be entrusted to any one of those persons, the court may by order place the child in the custody of any other person or of any association the objects of which include child welfare.*

(2) *In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to that consideration, the court shall have regard to —*
(a) *the wishes of the parents of the child; and*
(b) *the wishes of the child, where he or she is of an age to express an independent opinion.*

(3) *It shall be a reputable presumption that it is for the good of a child during his or her infancy to be with his or her mother, but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.* (Emphasis added.)

Section 87 of the Enactment provides as follows:

(1) *An order for custody may be made subject to such conditions as the court thinks fit to impose and, subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.*

(2) *Without prejudice to the generality of subsection (1), an order for custody may —*
(a) *contain conditions as to the place where the child is to live and as to the manner of his or her education;*
(b) *provide for the child to be temporarily in the care and control of some person other than person given custody;*
(c) *provide for the child to visit a parent deprived of custody of any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court considers reasonable;*
(d) *give a parent deprived of custody of any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the court considers reasonable;* or
(e) prohibit the person given custody from taking child out of Malaysia. (Emphasis added.)

The court shall now deal with some of the decided cases cited by both the learned counsel.

In the case of *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618, the plaintiffs who are Muslims and who are the natural parents of Noorhadiah bte Abdul Shaik ('the said child') had sought, inter alia, a declaration, from the Civil High Court that the adoption of the said child by the first defendant who is the said child's paternal uncle being the brother of the first plaintiff who is the natural father of the saidchild, was null and void; an order that the first defendant and his wife, the second defendant; and an order that the first defendant and his wife, the second defendant, return the said child to the plaintiffs; or in the alternative for an order that the plaintiffs' be given access to the said child.

The paternal uncle sought to have the proceedings struck out pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC') on the sole ground that the claims are within the jurisdiction of the Syariah Court and not the High Court.

The natural parents contended that their claims are within the jurisdiction of the High Court.

A At the outset Abdul Hamid Mohamad J (as his Lordship then was) observed at p 623, as follows:

> It is settled law that, in view of the provisions of art 121(1A) of the Federal Constitution, if a matter falls within the jurisdiction of the Syariah Court, this court has no jurisdiction over it — see judgement of Hashim Yeop A Sani CJ (Malaya) in *Dalip Kaur v Pegawai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & satu yang lain* [1992] 2 MLJ 244, *Mohamad Habibullah bin Mahmood v Faridah bte Dato' Talib* [[1992] 2 MLJ 793] and *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [[1999] 1 MLJ 489].

B

In holding that the prayer for the return of the said child involved, at least, C the question of custody of a child which is a matter clearly within the jurisdiction of the Syariah Court as provided for in ss 81–87 of the Islamic Family Law (State of Pulau Pinang) Enactment 1985 and that the plaintiffs should file a fresh action in the Syariah Court for the prayer for the return of the said child to the plaintiffs and the alternative prayer for access to the said child by the plaintiffs, the learned judge held that following the D judgment of the Federal Court in *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 which was written by Mohamed Dzaiddin FCJ (now the Chief Justice), the correct approach which a court should adopt once a challenge to the jurisdiction of the Syariah Court (or for that matter of the Civil High Court vis a vis the jurisdiction of the Syariah Court) is made is as follows. I quote E the following excerpt at p 624:

> ... the court should look at the State Enactments, not the State List to see whether the Syariah Court has jurisdiction over the matter and if it has, then, this court has no jurisdiction over the matter.

F In *Soon Singh*, although the remedy sought was for a declaration, the Federal Court had considered the question of jurisdiction purely on 'the subject matter approach' as opposed to the 'remedy approach' which was adopted in *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu yang lain* [1992] 2 MLJ 224 by the Supreme Court where the subject matter of the suit was 'wakaf' but the remedy sought was for an injunction.

G In my judgment, the case of *Abdul Shaik bin Md Ibrahim* is applicable to the facts of the instant case and this court is bound by the judgments of the Federal Court in *Soon Singh* and *Sukma Darmawan*. Therefore, the fact that the remedy sought for by the applicants in this case is a writ of habeas corpus which is not expressly conferred by the Enactment on the Syariah H Court does not mean that this court is seized with jurisdiction because custody of a Muslim child is a subject matter which is clearly within the jurisdiction of the Syariah Court by virtue of ss 81–87 of the Enactment.

In *Nor Kursiah*, which was approved by the Court of Appeal in *Lim Yik Ying*, the applicant who is the natural mother alleged that her child was illegally detained by his father and grandmother who are the first and I second respondents, respectively, despite a temporary order made by the Syariah High Court that the child was to be placed under the care and control of the second respondent at the address of the first respondent. The

applicant also contended that the temporary order of the Syariah Court had no effect because it was not served on the respondents before the child was taken away from her by the first respondent. The applicant further argued that in any 'detention' if there is a failure to follow each step in the process, the court must interfere.

The respondents' counsel raised a preliminary objection that the High court had no jurisdiction to hear the habeas corpus application.

KC Vohrah JCA (as his Lordship then was) dismissed the preliminary objection and held that the High Court has jurisdiction to entertain the habeas corpus application. In so holding, his Lordship applied the judgment of the Supreme Court in *Majlis Agama Islam Pulau Pinang* (which I have made reference to earlier on when commenting on the decision of the Federal court in *Soon Singh*) and *Mohamed Habibullah.*

Consequently, his Lordship held as follows on p 1249:

> It will be observed that this application carried with it its own seed of destruction from the day it was filed. The disclosure in the first supporting affidavit to the application that there is an order placing the child in the care and control of his grandmother and giving a direction that the child stays with his father — and the said order is an order that cannot be challenged in a civil court by virtue of art 121(1A) of the [Federal] Constitution, it having been issued by the Syariah Court within its jurisdiction and therefore a valid subsisting order — destroyed the very foundation of the allegation of the child being illegally detained by the respondents. The application fails *in limine* and I dismiss the application.

In the case of *NMY (an infant) v Pengetua Pusat Pemulihan Gadis, Taman Sri Puteri Rembau, Negeri Sembilan Criminal Application* reported in 5 *Mallal's Digest* (4th Ed, 2001 Reissue) at para 1823 on p 517 of, Hashim JC (as his Lordship then was) in dismissing an application for a writ of habeas corpus by the maternal grandmother for the release of her granddaughter ('NMY'), a Muslim juvenile aged 16 years and three months, who was at that time at a place of refuge for girls aged under 18 years old who were ill-treated or exposed to moral danger held, inter alia, that under s 366 of the CPC, the court, on an application for a writ of habeas corpus had to be satisfied that there were grounds for supposing that a detainee was being detained 'against her will and without cause'.

In my judgment, the facts in *Nor Kursiah* are distinguishable from the facts in the instant case because in that case the sole issue for the determination of the High Court is whether the child was illegally or improperly detained by the respondents.

The decision of this court

It is apparent from the conflicting affidavits filed by the parties that quite apart from the dispute pertaining to whether the child was given to the respondents to be raised as their child or only merely handed over to the respondents to be taken care of temporarily until the first applicant recovered completely from her post partum depression, the bone of contention of the natural parents is that the child has not been brought up

nor educated in a proper manner. Their objective in filing the application is for this court to order that the child return to her natural parents on the ground that such an order is in the best interests of the child and is in accordance with the custody order despite the custody order having been obtained without the consent of the child, the two police reports lodged by the child, one stating that she prefers to stay with the respondents and the other alleging that the applicants dragged and punched her on 26 October 2000 when they attempted to force her into a taxi to take her home with them and the refusal of the Syariah subordinate court to hold the respondents in contempt of the custody order and to commit the respondents to prison for non-compliance of the custody order.

The order of the Syariah subordinate court dismissing the applicants' application to commit the respondents to prison for non-compliance of the custody order is a valid and subsisting order which has overtaken the custody order. It cannot be challenged in a civil court by virtue of art 121(1A) of the FC.

The effect of the second order is that the applicants' sole recourse now is to appeal to the Syariah High Court against the order of the Syariah subordinate court since the latter is satisfied that the child herself has refused to return to the applicants. This court cannot go into the merits of the order of the Syariah subordinate court because this court has no jurisdiction to review it. This court must accept it as a valid and subsisting order.

It is very pertinent that the application in the instant case for a writ of habeas corpus is not mounted on the ground that the child is illegally or improperly detained in the private custody of the respondents. The objective of the applicants in filing this application is to seek an order of the court that the child be produced for the purposes of the hearing of the application on its merits, and upon the conclusion of the hearing of the application for this court to order the child to return to and be brought up by the applicants, in the event that the applicants are successful in satisfying this court that such an order would be in the best interests of the child and because there is already a custody order.

In my judgment, this court has no jurisdiction to grant the order sought because the writ of habeas corpus can only be granted to order that the child be set at liberty, if this court is satisfied that the child is illegally or improperly detained. It is not intended to order that the child be produced so as to enable this court to determine whether it is for the good of the child who is a Muslim child that she returns to her natural parents and for this court to order accordingly. The reason is because whether it is for the good of or whether it is in the best interests of the child that she be returned to the applicants is for the Syariah Court to decide after taking into consideration all the facts and circumstances of the instant case and the relevant factors as provided for in ss 81–87 of the Enactment.

The child here was aged 14 years at the time of the filing of the application and at the time when the court heard the application, the child was already aged 14 years and six months unlike the child in *Nor Kursiah*

and *Lim Yik Ying*. It is for the Syariah Court to determine whether she has already reached an age when she has a will and wishes of her own and is able to express an independent opinion. It is not disputed by the applicants that the custody order although obtained inter partes was obtained without the consent of the child.

More importantly, unlike in *Nor Kursiah* and *Lim Yik Ying*, the applicants have failed in their committal proceedings against the respondents and there are allegations in the respondents' affidavit in reply and in the police reports lodged that the first applicant had hit the child on her head with a metal hanger which caused the child's head to be swollen and that the child has suffered bruises on her back as a result of a struggle which occurred when the applicants attempted to force her into a taxi to take her home with them.

Again, it is for the Syariah Court to determine whether there is any truth in the allegations and counter allegations of the applicants, the respondents and the child.

In the premises, the court allowed the preliminary objection of the respondents, declined to answer the second issue posed in the application and dismissed the application.

Preliminary objection upheld and application dismissed.

Reported by Lim Lee Na